

TABLE OF CONTENTS

Table of Authorities.....	2
Jurisdictional Statement.....	4
Statement of Facts.....	5
Point Relied On.....	8
Argument.....	10
Conclusion.....	21

TABLE OF AUTHORITIES

Article 5, Section 4, Constitution of Missouri.....	4
<u>R.S.Mo. 351.015</u>	15
<u>R.S.Mo. 351.588</u>	15,16,17
<u>R.S.Mo. 351.625(repealed)</u>	16,17
<u>R.S.Mo. 351.375</u>	15,16,17
<u>R.S.Mo. 508.010</u>	4, 10, 11, 12, 14, 16,21
<u>R.S.Mo. 508.040</u>	13,14,20,21
<u>State ex rel. Bowden v. Jenson</u> ,359 S.W.2d 631(Mo. banc 1960).....	16,17
<u>State ex rel.Bunker Resource, Recycling and Reclamation, Inc. v. Dierker</u> , 955 S.W.2d 531(Mo. banc 1997).....	19,21
<u>State ex rel. DePaul Health Center v. Mummert</u> , 870 S.W.2d 820(Mo. 1994).....	11,14
<u>Dishman v. Joseph</u> , 14 S.W.3d 709,715(Mo. App. W.D. 2000).....	10
<u>Fritzshall v. Board of Police Commissioners</u> , 866 S.W.2d 20(Mo. App. 1994).....	17
<u>State ex rel. King v. Walsh</u> , 484 S.W.2d 641(Mo. 1972).....	17
<u>State ex rel. Meek v. Smith</u> , 974 S.W.2d 656(Mo.App. 1998).....	11

<u>McGhee v. Dixon</u> , 973 S.W.2d 847,848 (Mo. banc 1998).....	10
<u>State ex rel. Palmer by Palmer v. Goeke</u> ,	
8 S.W.3d 193(Mo. App. 1999).....	11
<u>Pruitt v. Farmers Insurance Company, Inc.</u> ,	
950 S.W.2d 659(Mo. App. 1997).....	17
<u>State ex rel. Stamm v. Mayfield</u> ,	
340 S.W.2d 631(Mo. banc 1960).....	16
<u>State of Missouri v. Tustin</u> ,	
322 S.W.2d 179(Mo. App. 1959).....	18,19

JURISDICTIONAL STATEMENT

This action involves a question of whether Respondent Honorable Jon R. Gray can properly transfer this cause, case number 00CV2233514, entitled Stacey Sue Greenwood v. Ryan Travis Pace, et al., from Jackson County to St. Louis County or Dallas county, as proposed in Respondent Gray's Hearing Memorandum of January 17, 2001, even though the case was initiated against Kenneth Dwayne Williams, a non-resident, and American Isuzu Motors, Inc., a foreign corporation with no residence in Missouri, making venue proper in any county pursuant to R.S.Mo. 508.010(4), so that this Court has jurisdiction of this Writ proceeding under Article 5, section 4, of the Missouri Constitution.

STATEMENT OF FACTS

This action for the wrongful death of Michael J. Greenwood was filed on September 28, 2000, in the Circuit Court of Jackson County, Missouri, against two non-resident defendants, Kenneth Dwayne Williams, a resident of the State of Arkansas, and American Isuzu Motors, Inc., (“Isuzu”) a foreign corporation with a registered agent in St. Louis County, Missouri, but with no office or agent for the transaction of their usual and customary business within the State of Missouri (Relator’s petition, Respondents’ answer, paragraph 1). David A. Barneich, Vice President of Strategic Planning for American Isuzu Motors, Inc. (deposition of David A. Barneich, Appendix, tab 9, p.7, lines 1-9), testified that American Isuzu Motors, Inc. is a California corporation, with four regional offices in states other than Missouri, and that neither owns, occupies, nor leases any real estate in Missouri. (deposition of David A. Barneich, Appendix, tab 9, p.39, line 20-p.40, line 19). It has employees who live and work in Missouri, but who, with the exception of one employee who works regularly in the facility of an independent contractor, have no regular workplace in Missouri. They circulate around the state calling on dealerships. (deposition of David A. Barneich,

Appendix, tab 9, deposition exhibit 2; p.19, line 24-p.20, line 8; p.29, line 12-24).

The occurrence leading to the death of Michael J. Greenwood occurred in Dallas County, Missouri. (Relator's petition, Respondents' answer, paragraph 2)

On October 2, 2000, plaintiff filed an amended petition adding two additional individual defendants, Ryan Pace and Mike Adams, both of whom are Missouri residents (Relator's petition, Respondent's answer, paragraph 3). Defendant Isuzu filed a motion to dismiss or transfer for improper venue (Appendix, tab 7) and defendants Pace and Adams filed a motion for change of venue (Appendix, tab 4).

On January 17, 2001, respondent issued a Hearing Memorandum conditionally granting defendants' motion to transfer venue from Jackson County. (Appendix, tab 11). In that Memorandum, respondent stated his belief that Jackson County is an improper venue, that Dallas County and St. Louis County are proper venues, and that defendants' motions for transfer of venue would be granted on or after February 1, 2001, unless respondent was prohibited from doing so by the issuance of a writ from a superior court (Appendix, tab 11).

On January 29, 2001, relator filed a writ of prohibition in the Missouri Court of appeals, Western Division. By order entered February 5, 2001, the Court of Appeals denied the writ (Relator's petition, Respondents' answer, paragraph 6). Relator then filed this writ.

POINT RELIED ON

THE TRIAL COURT ERRED BY CONDITIONALLY GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE FROM JACKSON COUNTY BECAUSE VENUE IS PROPER IN JACKSON COUNTY PURSUANT TO R.S.MO. 508.010(4) IN THAT, AT THE TIME OF THE INITIATION OF SUIT, THERE WERE ONLY TWO DEFENDANTS, KENNETH DWAYNE WILLIAMS, A NON-RESIDENT AND AMERICAN ISUZU MOTORS, INC., A FOREIGN CORPORATION WITH NO PHYSICAL RESIDENCE IN MISSOURI.

State ex rel.Bunker Resource, Recycling and Reclamation, Inc. v.

Dierker, 955 S.W.2d 531(Mo. banc 1997)

State ex rel. DePaul Health Center v. Mummert,

870 S.W.2d 820(Mo. 1994)

State ex rel. Meek v. Smith, 974 S.W.2d 656(Mo.App. 1998)

State ex rel. Palmer by Palmer v. Goeke,

8 S.W.3d 193(Mo. App. 1999)

R.S.Mo. 351.015

R.S.Mo. 351.588

R.S.Mo. 351.625(repealed)

R.S.Mo. 351.375

R.S.Mo. 508.010

R.S.Mo. 508.040

ARGUMENT

THE TRIAL COURT ERRED BY CONDITIONALLY GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE FROM JACKSON COUNTY BECAUSE VENUE IS PROPER IN JACKSON COUNTY PURSUANT TO R.S.MO. 508.010(4) IN THAT, AT THE TIME OF THE INITIATION OF SUIT, THERE WERE ONLY TWO DEFENDANTS, KENNETH DWAYNE WILLIAMS, A NON-RESIDENT AND AMERICAN ISUZU MOTORS, INC., A FOREIGN CORPORATION WITH NO PHYSICAL RESIDENCE IN MISSOURI.

STANDARD OF REVIEW

Relator seeks this writ on the ground respondent has misconstrued or misapplied the law with respect to venue pursuant to 508.010(4).

Where the claim is that the trial court misconstrued or misapplied the law, the appellate court reviews the trial court's decision on a *de novo* basis.

See, e.g. McGhee v. Dixon, 973 S.W.2d 847, 848 (Mo. banc 1998);

Dishman v. Joseph, 14 S.W.3d 709, 715 (Mo. App. W.D. 2000).

VENUE IS PROPER IN JACKSON COUNTY

Prohibition is proper to prevent a trial court from improperly exceeding its jurisdiction in transferring a cause of action where venue is proper. *State ex rel. Meek v. Smith*, 974 S.W.2d 656, 657 (Mo.App. E.D. 1998). A trial judge is without discretion to disturb a plaintiff's choice of proper venue within the State. *State ex rel. Palmer by Palmer v. Goeke*, 8 S.W.3d 193, 196 (Mo.App. E.D. 1999). Thus, if venue is proper in Jackson County, Missouri, where the case was brought, prohibition will lie to prevent the judge from ordering the case transferred to another venue. *Id.*

Under *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 823 (Mo. 1994), venue is determined as the case stands when brought. In *Mummert*, the case was originally brought in the Circuit Court of the City of St. Louis against two corporations and an individual, all of whom as it turned out were residents of St. Louis County. Because both individuals and corporations were sued, venue was determined under 508.010.¹ When the plaintiff learned of the residence of the individual

¹ **508.010. Suits by summons, where brought**

Suits instituted by summons shall, except as otherwise provided by law, be brought:

- (1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;
- (2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;
- (3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;
- (4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state;
- (5) Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found;
- (6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties, and process therein shall be issued by the court of such county and

defendant, plaintiff dismissed him and contended that venue should then be determined under 508.040² because only corporations were parties.

may be served in any county within the state; provided, however, that in any action for defamation or for invasion of privacy the cause of action shall be deemed to have accrued in the county in which the defamation or invasion was first published.

² **508.040. Suits against corporations, where commenced**

Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

Plaintiff asserted that venue was proper under 508.040 because one of the defendants had an office in the City of St. Louis for the transaction of their usual and customary business.

The Supreme Court held in *Mummert* that the venue statute states that venue is determined as the case stands when brought, and that none of the defendants were residents of St. Louis County when the case was brought. Although defendants disagreed below that *Mummert* is controlling, Respondent apparently concluded that *Mummert* does control since his Hearing Memorandum states that Dallas County and St. Louis County are proper venues. Respondent's Memorandum does not mention Hickory County or Polk County as proper venues, as indeed they are not under *Mummert* inasmuch as the two individual defendants residing in these counties were not defendants at the time the case was brought.

In determining venue at the time the case was brought as is required by *Mummert*, the deciding question is whether defendant Isuzu is a nonresident of Missouri such that R.S.Mo 508.010(4) applies or whether defendant Isuzu should be treated as a domestic corporation and considered a resident of St. Louis County where it maintains a registered agent, such that R.S.Mo. 508.040 applies.

Because Isuzu is a corporation organized under the laws of another state (California), it is a “foreign corporation.” R.S.Mo. 351.015(7).³ As used in Chapter 351, the unmodified term “corporation” is expressly defined to exclude a foreign corporation. R.S.Mo 351.015(6).⁴ With respect to domestic corporations, residence is fixed for venue purposes as the county in which they maintain their registered agent. R.S.Mo. 351.375.2.⁵ The foreign corporation counterpart to 351.375 is R.S.Mo. 351.588, which does not contain any provision similar to the provision contained in section 351.075 establishing a county of residence for venue

³ “‘Foreign corporation’ means a corporation for profit organized under laws other than the laws of this state” R.S.Mo. 351.015(7).

⁴ “‘Corporation’ or ‘domestic corporation’ includes corporations organized under this chapter or subject to some or all of the provisions of this chapter except a foreign corporation” R.S.Mo. 351.015(6).

⁵ “The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.” R.S.Mo. 351.375.2.

purposes. Section 351.588 has not been construed by any court since its passage.

The predecessor to section 351.588 was section 351.625 which was the subject of conflicting decisions by the Missouri Supreme Court. In *State ex rel. Stamm v. Mayfield*, 340 S.W.2d 631, 634 (Mo. banc 1960), the court held that the portion of section 351.375 fixing the residence of a domestic corporation as the county in which it maintains its registered agent, is inapplicable to foreign corporations. The court reversed itself in *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343, 351 (Mo. banc 1962), holding that a foreign business corporation ‘resides’ in the county where its registered office and registered agent is located. However, both *Stamm* and *Bowden* involved the question of whether a foreign corporation who had offices for the transaction of its usual and customary business resided in such county or counties or in the county in which it maintained its registered office. Neither case presented the question here presented — whether a foreign corporation with no office for the transaction of its usual and customary business in the state of Missouri is a nonresident for purposes of R.S.Mo. 508.010(4) or whether it should be considered a Missouri resident solely by reason of the presence of a registered agent in Missouri.

Perhaps more importantly, the statute under consideration in *Stamm* and *Bowden* — R.S. Mo. § 351.625 was repealed in 1990 and replaced by what is now § 351.588. Unlike § 351.625, § 351.588 contains no reference to § 351.375. As the court noted in *Bowden*, § 351.625 incorporated at least a portion of § 351.375. The fact that § 351.588 does not do so calls into question the continued vitality of *Bowden*.

There are a good many Missouri decisions that struggle with the issue of the meaning of residence, often in the context of comparing it to domicile. It has been considered in the context of insurance policies, see, *e.g.*, *Pruitt v. Farmers Insurance Company, Inc.*, 950 S.W. 2d 659 (Mo. App. 1997); in the context of residence for the purpose of employment, see, *e.g.*, *Fritzshall v. Board of Police Commissioners*, 866 S.W. 2d 20 (Mo. App. 1994); and in the context of residence to establish the constitutional right to run for political office, see, *e.g.*, *State ex rel. King v. Walsh*, 484 S.W. 2d 641 (Mo. 1972). All of those cases rely, in some part, on the definition of residence set forth in *State ex rel. King v. Walsh*, 484 S.W. 2d 641, 644:

“Residence or domicile has been defined to be ‘. . . the place with which a person has a settled connection for certain legal purposes, either because his home is there or because that

place is assigned to him by law, . . .’ and also as ‘that place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.’”

Citing *In re Tolers Estate*, 325 S.W. 2d at 759. Such a definition requires that a person, to have any residence, must have some identifiable “principal establishment” to which he has the intention of returning. Clearly, Isuzu has no such location in Missouri to which it intends to return. It is a California corporation with its principal place of business in California and with only transient ties to the state of Missouri.

Perhaps more to the point is *State of Missouri v. Tustin*, 322 S.W. 2d 179 (Mo. App. 1959) in which the court considered the conviction of a truck driver for operating without a Missouri driver’s license. The driver asserted that the vehicle being owned by a non-resident corporation was entitled to reciprocity as was he as the operator of that vehicle. The owner of the vehicle was a Delaware corporation with its principal place of business in Indiana. The court, at 181, held:

“We hesitate to essay any definition of ‘residence’ for the word is like a slippery eel, and the definition which fits one

situation will wriggle out of our hands when used in another context or in a different sense. It is generally said that a corporation's place of domiciliary citizenship is the state of its incorporation, and that this can never change . . . and that for many practical purposes the 'residence' of a corporation is the place where it has its principal place of business and 'lives its life,' even though it may have a technical domicile in the state of its creation."

Isuzu cannot be said to "live its life" in Missouri. As David A. Barneich, Vice-President of Strategic Planning for Isuzu testified in his deposition (Appendix, tab 9) and as conceded by Respondents, Isuzu lives in California and in four regional offices, none of which are in Missouri. Clearly, some of the employees of Isuzu live in Missouri, and do some of their work in Missouri, but Isuzu, the corporation, has no physical presence in this state. It "lives its life" elsewhere.

Although *Tustin, supra*, suggests that a foreign corporation with a registered agent in the state has a "constructive residence" in the state of Missouri, the case of *State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker*, 955 S.W. 2d 931 (Mo. Banc 1997) teaches

that a corporation may be legally present in the state without maintaining an office for the conduct of its usual and customary business. In that case, the court considered a claim against the defendant-relator for injuries arising from a collision with a tractor-trailer driven by an employee of defendant-relator. After the collision, the Secretary of State administratively dissolved defendant-relator for failure to file an annual report. Plaintiff brought suit in the City of St. Louis pursuant to the motor carrier venue statute, R.S.Mo. § 508.070. The trial court overruled defendant-relator's motion to dismiss for lack of venue which argued that at the time suit was brought defendant-relator, having been dissolved, did not operate as a motor carrier in Missouri.

The Supreme Court agreed that R.S.Mo. § 508.070 was not the proper venue statute as defendant was not operating as a motor carrier at the time suit was filed. The court went on to hold that § 508.040 was the proper venue statute, and that it offered two alternatives for venue in the context of the claim: (1) where the claim accrued and (2) where the corporation kept an office or agent for the transaction of its usual and customary business. The court concluded that the claim had accrued in St. Louis County at the time of the commencement of suit, and further that as defendant-relator had been dissolved, it did not keep any office or

agent for the transaction of its usual and customary business, so that venue was only proper where the claim had accrued.

Missouri law clearly requires that to be a resident of Missouri one must “live one’s life” in a particular, identifiable place. Isuzu has no such identifiable place or location in the state of Missouri and is thus a non-resident. Like the relator in *Dierker*, *supra*, Isuzu has a constructive residence in this state, but has no “office or agent for the transaction of its usual and customary business,” *i.e.*, Isuzu is legally present in the state, but in no particular place.

Under the circumstances, Isuzu must be said to be a foreign corporation not subject to the provisions of R.S.Mo. 508.040, and a non-resident in the state of Missouri, subject to the provisions of R.S.Mo. 508.010, as a defendant in a suit instituted by summons. As all defendants at the initiation of suit were non-residents, venue is proper pursuant to R.S.Mo. 508.010(4) in any county in the state, including Jackson County.

CONCLUSION

Wherefore, relator prays this Court to make and enter its judgment making its Alternative Writ of Mandamus permanent prohibiting

respondent from transferring this cause from Jackson County and remanding this cause for further proceedings.

CAMPBELL, HOLT & ASSOCIATES

By: _____

John Harl Campbell #21913
2306 Commerce Tower
P.O. Box 13085
Kansas City, Missouri 64199
(816) 471-6630
(816) 471-1123 FAX

ATTORNEYS FOR RELATOR

CERTIFICATE PURSUANT TO SPECIAL RULE NO. 1

Pursuant to Special Rule No. 1, the undersigned does hereby certify that this brief contains the information required by Rule 55.03, that it complies with the limitations of Special Rule No. 1(b), and contains 3,297 words.

John Harl Campbell
ATTORNEY FOR RELATOR

PROOF OF SERVICE

Pursuant to Supreme Court Rule 84.24, the undersigned hereby certifies that on this _____ day of May, 2001, he caused to be served by

U.S. mail, postage prepaid, two copies of Relator's Brief to the following individuals:

Hon. Jon R. Gray
Division 18
Jackson County Circuit Court
415 E. 12th Street
Kansas City, Missouri 64105
RESPONDENT

Robert T. Adams, Esq.
Shook, Hardy & Bacon, L.L.P.
One Kansas City Place
1200 Main Street, Suite 2700
Kansas City, MO 64105
ATTORNEYS FOR AMERICAN ISUZU MOTORS, INC.

Kenneth Dwayne Williams,
ADC#00957
Arkansas Dept. Corrections
Varner Super Max
P.O. Box 600
Grady, AR 71644

Theodore A. Bruce
Andrea K. Spillars
Assistant Attorneys General
P. O. Box 899
Jefferson City, MO 65102
ATTORNEYS FOR DEFENDANTS PACE AND ADAMS

John Harl Campbell
ATTORNEY FOR RELATOR